IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
FILED
DEC 9 1976
MICHAEL RODAK, JR., CLERK

No. 75-5444

EHRLICH ANTHONY COKER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Georgia affirming petitioner's convictions of rape, armed robbery, kidnapping, escape, and motor vehicle theft, and his sentence of death by electrocution for rape, is reported at 234 Ga. 555, 216 S.E.2d 782 (1975) (A. 332-343). The judgment of the Ware County Superior Court finding petitioner guilty and sentencing him to die is unreported and appears at A. 317-318.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3) (1970), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Georgia was entered on May 20, 1975, rehearing denied June 17, 1975, and July 10, 1975. The petition for certiorari was filed on September 15, 1975, and was granted on October 4, 1976.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the Georgia Code Annotated:

Ga. Code Ann. §26-2001 (1972)

"*Rape.*—A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one or more than 20 years. No

conviction shall be had for rape on the unsupported testimony of the female."[1]

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[1] In addition to being convicted of the crime of rape, petitioner was convicted of violating the following statutes:

Ga. Code Ann. §26-1312 (1972)

"*Kidnapping.*—(a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.

. . . .

A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years: Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Provided, further, that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death."

Ga. Code Ann. §26-1813 (1972)

"*Motor vehicle theft.*—(a) *First offense.*—(1) Motor vehicles.—The theft of any motor vehicle as defined by an Act regulating traffic upon the highways, approved January 11, 1954 (Ga. Laws 1953, Nov.-Dec. Sess., p. 566) [Chapters 68-15 through 69-17], shall be a felony. Any person convicted thereof shall, the first offense, be punished by imprisonment in the penitentiary for not less than three years nor more than seven years: Provided that the jury may recommend that same be punished as for a misdemeanor."

Ga. Code Ann. §26-1902 (1972)

"*Armed robbery.*— A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense of robbery by intimidation shall be lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years."

Ga. Code Ann. §26-2501 (1972)

"*Escape.*—A person commits escape when he: (a) having been convicted of a felony or misdemeanor, or of the violation of a municipal ordinance, intentionally escapes from lawful custody or from any place of lawful

(continued)

Ga. Code Ann. §26-3102 (1975) supp.)

"*Capital offenses; jury verdict and sentence.*—Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstances shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. §27-2302 (1975 supp.)

"*Recommendation to mercy.*—In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of

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(footnote continued from preceding page)

confinement; or (b) being in lawful custody or lawful confinement prior to conviction, intentionally escapes from such custody or confinement. A person who, having been convicted of a felony or misdemeanor, is convicted of escape shall be punished by imprisonment for not less than one nor more than five years. Any other person convicted of escape shall be punished as for a misdemeanor except that a person who commits escape while armed with a dangerous weapon shall, upon conviction, be punished by imprisonment not less than one nor more than 10 years."

imprisonment for life. Such recommendation shall be binding upon the judge."

Ga. Code Ann. §27-2503 (1975 supp.)

"*Presentence hearings in felony cases.*—(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of 'guilty' by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall

resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law."

Ga. Code Ann. §27-2512 (1972)

"*Electrocution substituted for hanging; place of execution.*—All persons who shall be convicted of a capital crime and who shall have imposed upon them the sentence of death, shall suffer such punishment by electrocution instead of by hanging.

In all cases in which the defendant is sentenced to be electrocuted it shall be the duty of the trial judge, in passing sentence, to direct that the defendant be delivered to the Director of Corrections for electrocution at such penal institution as may be designated by said Director. However, no executions shall be held at the old prison farm in Baldwin County."

Ga. Code Ann. §27-2513 (1972)

"*Death chamber and apparatus.*—The Board of Corrections shall provide a death chamber and all necessary apparatus, machinery and appliances for inflicting such penalty by electrocution."

Ga. Code Ann. §27-2514 (1975 supp.)

"*Sentence of death; copy for penitentiary superintendent. Time and mode of conveying prisoner to penitentiary. Expenses.*—Upon a verdict or judgment

of death made by a jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of a new trial, or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of county commissioners, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county."

Ga. Code Ann. §27-2515 (1972)

"*Execution by warden and assistants; witnesses.*—There shall be present at such execution the warden of the penitentiary, or a deputy warden thereof, who shall serve as executioner, at least two assistants, two physicians to determine when death supervenes, an electrician, a suitable guard, and, if the condemned

person so desires, his counsel, relatives and such clergymen and friends as he may desire."

Ga. Code Ann. §27-2516 (1972)

"*Certificate of execution.*—The executioner and attending physician shall certify the fact of such execution to the clerk of the superior court of the county in which said sentence was pronounced, which certificate shall be filed by the clerk with the papers in the case."

Ga. Code Ann. §27-2517 (1972)

"*Disposition of body; expenses of transporting body.*—The body of the person so executed shall be delivered to the relatives if they so desire, and in case no claim is made by relatives for such body the same shall be disposed of as bodies of convicts dying in the State penitentiary: Provided, that if the nearest relatives of the person so executed desire that the body be carried to the former home of the person so executed, if in the State, the expenses of such transportation shall be paid by the ordinary, or the board of commissioners of roads and revenues, county commissioners or other person or persons having charge of the county funds out of any funds on hand in the treasury of the county in which such person was convicted."

Ga. Code Ann. §27-2534.1 (1975 supp.)

"*Mitigating and aggravating circumstances; death penalty.*—(a) the death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, or himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation.

The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. §27-2537 (1975 supp.)

"*Review of death sentences.*—(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a

synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Petitioner Ehrlich Anthony Coker has been condemned for the offense of rape under Georgia's 1973 capital punishment statute.

On September 2, 1974, petitioner was serving sentences for murder, rape, kidnapping, and aggravated

assault at the Ware Correctional Institution three miles west of Waycross, Georgia.[2] (A. 306-312.) At 8:10 p.m., during an Alcoholics Anonymous meeting in the prison chapel attended by petitioner and thirty-two other inmates and supervised by two guards, an inmate named Brinks suddenly brandished a two-foot long wrench and declared, " 'Don't move. This is an escape. I don't want to hurt anybody.' " (A.80.) The guards were allowed to gather together the inmates who were not assisting Brinks; a group of nine prisoners, including petitioner, refused to join the guards. (A. 82.) During the confrontation between Brinks and his confederates and the guards, petitioner and three other inmates tore out the plywood ceiling in a hallway leading to the chapel and climbed into an attic which opened onto the roof of the building. A few minutes later, guards took charge of the inmates in the chapel without any violence and returned them to their respective cells. A head count revealed that petitioner and two other prisoners were not present in their cells. (A. 102.)[3]

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[2] On March 12, 1973, petitioner was convicted in the Richmond County Superior Court of the kidnapping and rape of one Susan Lorrine Jones and received sentences of, respectively, life imprisonment and twenty years imprisonment. (A. 307.) On May 28, 1973, in the Taliaferro County Superior Court, petitioner pleaded guilty to the rape of and aggravated assault upon Miss Jones, and received sentences of, respectively, life imprisonment and eight years imprisonment. (A. 311-312.) On April 6, 1973, in the Clayton County Superior Court, petitioner pleaded guilty to the rape and murder of one Sue Ann Wick and received sentences of, respectively, twenty years imprisonment and life imprisonment. (A. 309.)

[3] There was no evidence that petitioner helped plan the disturbance or held the captured guards hostage. A report prepared by Ware Correctional Institution Warden Bruce Brown, contained in a presentence investigation report which was not before the sentencing jury (*see* note 15 *infra*), recites:

"During the inside Alcoholics Anonymous Meeting held in the Visiting Room on September 2, 1974 at approximately

(continued)

Later that evening, at approximately 11:00 p.m., sixteen-year-old Allen Carver (A. 111) and his wife,

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(footnote continued from preceding page)

8:00 P.M., the following inmates were involved in kidnaping and holding as hostages Officers Joyce Shiver and Gene A. Barber: Dearwood Huggins, Samuel Bennie Butler, James Thomas Dixon, Robert Lawton Jones, William G. Brinks, and James E. Skidmore. Inmates Brinks, Jones, and Skidmore acted as ring leaders. The ring leaders had the use of a knife and a 24-inch handmade wrench weighing approximately 12 pounds and they ordered Officer Shiver not to interfere as they were planning to take over the institution and planning a mass escape.

"Shortly thereafter Officer Barber went to the Visiting Room to obtain a key from Officer Shiver. Officer Barber was jerked inside the Visiting Room and ordered not to interfere if neither officer wanted to get hurt.

"Officer Terrell Sublet, who was in charge of the front gate at this time, was informed of what was going on in the Visiting Room by an inmate. This inmate worked in the Officer's Dining Room and was coming from the shower room when he saw Officer Barber being pulled into the Visiting Room. He immediately came to the front gate and informed Officer Sublet of this happening. Officer Sublet immediately advised the Warden of what was taking place as he was not in his office at this time.

"Warden Bruce Brown then went to the front gate and asked for a spokesman to inform him of what was taking place. Inmate Brinks came to the front gate and stated that he had two officers that they were planning to hold until they were promised a transfer from the institution that same night. Warden Brown told him to release the officer then they would discuss the demands.

"Inmate Brinks went back into the Visiting Room and the two officers were released unharmed. They in turn were ordered to lock up all the inmates and get a count immediately. The count showed three inmates missing. Roll call indicated that Frank Smith, Jr., Ehrlich A. Coker, and Jefferson Holland were the three missing.

"Further investigation disclosed that they had escaped from the fire hatch in the loft of the Visiting Room and torn out the east vent escaping from the room of the building

(continued)

Elnita,[4] who had given birth to a son three weeks earlier (A. 112), were in the kitchen of their Waycross home when petitioner suddenly entered the house through the unlocked kitchen door. Petitioner, twenty-four years old, was five feet, seven inches tall and weighed about 140 pounds. (A. 206, 257.) He was wearing prison clothes and was holding a "board" (A. 114) over his head. He said, " 'Don't anybody try anything and nobody will get hurt' " (A. 141), then ordered the Carvers to go into the bedroom where he had Mrs. Carver tie her husband's hands and feet together with one of her blouses. Unsatisfied with her work, petitioner tied Carver to the shower rod in the bathroom. (A. 115, 168.) He changed into a pair of Carver's pants and inquired whether the couple had any cigarettes, a gun or a knife, anything to drink. (A. 116, 172.) Holding Mrs. Carver's arm, he went with her into the kitchen, where she gave him some iced tea and a steak knife with a four-inch blade. (A. 168-169.) In the kitchen, petitioner turned out the lights and put the knife under his belt loop. (A. 118, 146, 169.) He then returned to the bedroom where he took Carver's

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(footnote continued from preceding page)

near the Officer's Dining Room area. After this they headed toward the ballfield and there freedom.

"Warden Brown talked with Officers Shiver and Barber shortly afterwards. Both officers were in a high state of tension and stated they feared for their lives since Inmate Brinks and others were armed with a knife and a heavy iron wrench.

"Warden Brown stated that warrants would be taken for all these inmates charging them, with the exception of Inmates Coker, Smith, and Holland, with kidnapping and interfering with officers in the line of duty. Inmates Coker, Smith, and Holland were charged with escape."

(A. 259-260.)

[4] Both Carvers were sixteen years old. (A. 111, 326.) They were married on April 7, 1974. (A. 183.)

billfold, which contained $20.30, and the keys to the family car from a dresser top. (A. 125, 171.) He pushed the bassinette containing the baby, who was asleep throughout the incident, into the bathroom with Carver. (A. 139-140, 185-186.) Carver complained that his hands were growing numb in their bonds. (A. 138.) Petitioner replied that "it was better than being dead." (ibid); then he untied Carver from the shower rod, bound his hands to the bathroom sink and his feet to the toilet, and gave him a pillow to rest his head on (A. 138-139). According to Carver, petitioner "said for me not to try anything funny, that he didn't want to have to hurt me, and he said he'd hurt me . . . .[i]f I tried anything." (A. 116.)[5] Through the closed bathroom door, Carver heard his wife say " 'Please don't mess with me,' " and he "hollered" at petitioner, " 'Hey, you said you weren't going to mess with my wife,' " whereupon petitioner returned to the bathroom and gagged Carver (A. 117).

Petitioner ordered Elnita Carver, who was wearing a night gown, to get dressed so that she could show him

[5] On cross-examination, Mr. Carver testified:

"Q [Defense Counsel] Now, I thought I understood you to say that after he had you tied with your hands on the sink and your feet around the commode, is that when he said, 'Don't try anything funny. I don't want to hurt you'?"

A [Mr. Allen Carver] No.

Q When did he say that?

A When he started to messing with my wife and I told him that he said he wasn't going to do it, and he just said, 'Shut your mouth.' He said, 'I don't want to have to hurt you.'

Q He didn't say he was going to hurt you, did he? He said he didn't want to hurt you? Is that right?

A Yes."

(A. 144.) Carver also testified that he did not hear petitioner "threaten her [Mrs. Carver] any way." (A. 150.)

how to start the family car. (A. 172.) She asked whether she could go to the bathroom to change clothes, "and he said no, that he'd saw plenty of naked people before and he told me to go ahead and change the clothes right there." (*Ibid.*) Petitioner had previously dressed in Mr. Carver's clothes; however, as Mrs. Carver testified:

> "[w]hen I pulled off my gown he come up there and he started feeling of me – he come up to the back of me and started feeling of me, and I started crying and I told him to quit, and he kept on saying that he wouldn't hurt me, and that I'd better shut up, and I kept on telling him to quit and not mess with me. I told him not to touch me, or anything, and he gagged Allen so that he couldn't talk. I think it was with a piece of underwear and then tied something around his mouth, and he closed the bathroom door so that Allen couldn't see him, and then he kept on feeling of me and I kept crying and telling him to quit, and Allen started trying to say something, and I couldn't understand what he was saying. He was mumbling something. And I kept on telling him to quit and he said, 'I ain't hurting you, am I.' And I was scared and I didn't know what to say, and I just shook my head no, and I didn't say nothing and he said, 'I want your husband to know that I ain't hurting you.' He said, 'Tell your husband I ain't hurting you.' And I just said, 'Uh, huh,' like that. I didn't say it loud, and he said, 'He can't hear you saying it like that,' and, so, I said, 'No.' And then he said – he said, 'Come on out and tell your husband that I ain't hurting you if I ain't,' and, so I said, 'Allen, he ain't hurting me,' and I kept crying and I kept telling him to quit, and then he asked me – he said, 'When is the last time you've been with your husband?' And I said before I had the baby, and he said 'Well, it's time again, ain't it?' And I didn't say nothing."

(A. 172-173.) Petitioner then disrobed, "held the knife up at" Mrs. Carver (A. 174), placed it on top of the dresser, and "whispered . . . 'You know what's going to happen to you if you try anything, don't you?' And I was scared and I didn't know what to say, so I shook my head yes, and so he put the knife back down." (*Ibid*.) Petitioner proceeded to have sexual intercourse with her:[6] "he was on top of me and he kept on, and directly he got up and he told me to get on top of him, so, I got up and got on him, and he kept on till he got finished, and then he told me to get up and I got up." (*Ibid*.) Petitioner did not "hurt . . . [her] in any other way physically aside from" the act of intercourse (A. 188), although Mrs. Carver also testified that at this time she "still was menstruating from having the baby and I was weak, and everything" (A. 173).

After putting his clothes back on[7] and allowing Mrs. Carver to dress, petitioner inquired whether she knew the way to Atlanta. (A. 175.) Neither she nor her husband could give petitioner directions, and petitioner announced that he was taking Mrs. Carver with him. (A. 175.) According to Mrs. Carver, petitioner declared to her husband:

> " 'I'm going to take your wife with me, and if I don't get stopped by a police car or anything before I get to Waresboro,' he said, 'I'll tie her up and put her out at the station in Waresboro at that corner,' . . . . [H]e pulled the gag off of Allen's mouth when he was talking to him, and Allen said, 'Well, just make sure you don't hurt her,' and he put the gag back on his mouth and he said – he said, 'Well, I'm taking her with me.' He said, 'if you get loose and call the police,' he said, 'any time I see a police car pull up behind me and motion for me to get over or something like that,' he said, 'your wife is going to be dead.' "

(A. 176.)[8]

After petitioner drove away with Mrs. Carver sitting beside him, Allen Carver freed himself, went to a neighbor's house, and had the police called (A. 121-123) at about 1:15 a.m. (A. 154). Carver told the neighbor that "a convict" had raped and abducted his wife. (A. 153.) A widespread search for petitioner and Mrs. Carver was undertaken.

When petitioner and Mrs. Carver passed through Waresboro, he indicated that he would not let her out there but would keep her with him until the car ran out of gas. (A. 177.) A few miles outside of Waresboro, an unmarked police car passed the Carver automobile at a high rate of speed,[9] and petitioner suspected that it was a police car and that a roadblock had been set up ahead. (A. 178.) He turned off onto a dirt road, but the road soon came to a dead end, and he backed the car

[6] A vaginal examination of Mrs. Carver, performed at 5:00 a.m., September 3, 1974, disclosed the presence of sperm. (A. 196.)

[7] When petitioner was arrested, he was wearing Carver's shirt and pants and was carrying Carver's billfold (A. 126-128, 133-134). Petitioner's prison shirt and pants, marked with his prison laundry number, were found in the Carver bedroom by the police after petitioner's apprehension. (A. 163, 164, 219.)

[8] According to Allen Carver, petitioner gestured at Mrs. Carver with the knife during this speech. (A. 121.) According to Mrs. Carver, however, the knife was in petitioner's back pocket at this time. (A. 176.) Allen Carver also testified that, as he was leaving, petitioner "said that if he would get pulled over or the police was following him in any way that he would kill – he would kill my wife. He said he didn't have nothing to lose – that he was in prison for the rest of his life, anyway." (A. 121.)

[9] The Sheriff of Ware County, who was driving this unmarked patrol car, later testified that he had suddenly come up behind the Carver car at a curve in the road and had elected to pass the car without attempting to stop it or signal to it in order to prevent harm to Mrs. Carver. (A. 207.)

around and stopped, informing Mrs. Carver that they would wait there until the road block was lifted. (*Ibid.*) Petitioner unbuttoned her blouse but closed it again when she complained of the mosquitoes. (A. 178-179.) He also described his plan to get another car for his trip to Atlanta. (A. 179.)[10]

About ten minutes later, a police car turned down the dirt road and stopped in front of the Carver car. According to Mrs. Carver:

> "he said, 'I think that's a policeman right now,' and I didn't say nothing. He said – he said, 'Well, I reckon they're going to get me now,' and, he said, 'I won't never get away.' And I kept on setting there, and right after that one come up and parked some more cars started coming up and they all parked and all I could see was the lights shining, and then all those men got out and they started coming up there and they told him to get out of the car, and he set there for a minute and then he got up and got out of the car and they took him to the back and searched him and handcuffed him."

(A. 179-180.) Petitioner did not attempt to harm Mrs. Carver with the knife, which was behind the car's sun visor, although he had "ample opportunity" to do so according to the testimony of the Sheriff who led the arrest party. (A. 211-212.) Mrs. Carver appeared to the Sheriff to be "scared," "highly nervous," and "in a

[10]Petitioner told Mrs. Carver that the two of them would return to Waycross where he would send her to the door of a house "that just has a lady in it." (A. 177.) When the "lady" came to the door, petitioner would " 'jump up there and scare her with this knife.' " (*Ibid.*) The two of them would then " 'go in there and tie her up and get all her money.' " (*Ibid.*)

partial state of shock," but she didn't appear to be hurt in any way." (A. 213.)[11]

Petitioner was subsequently charged with escape, rape, armed robbery, motor vehicle theft, and kidnapping. (A. 4-5.) The indictment for rape charged that petitioner "unlawfully and with force and arms, did have Carnal Knowledge of Elnita Carver, a female, forcibly and against her will." (A. 4.) Counsel was appointed to represent him, and he entered both a special plea of insanity (A. 9) (that is, under Georgia practice, a plea of present incompetence to be tried) and a general plea of insanity (*ibid.*) (that is, a plea of not guilty by reason of insanity at the time of the offense) to the charges against him. A trial was first held upon petitioner's special plea of insanity to determine his competence to stand trial on the five criminal charges; and on November 19, 1974, the jury found him competent. (A. 75.)[12]

[11]The post-trial report of the trial court indicated that Mrs. Carver had not been "physically harmed or tortured." (A. 325.)

[12]The sanity trial was conducted pursuant to Ga. Code Ann. §27-1502 (1972). At this hearing, petitioner testified that he had received a blow to the head with a baseball bat when he was ten or eleven years old and that, as a result, he had blackout spells and memory lapses and frequently heard mysterious voices. (A. 13-15.) He also testified that it was his habit to drink alcohol heavily and frequently and that he customarily passed out as a result of a drinking bout. (A. 13-14.) Petitioner's defense counsel testified that petitioner was unable to assist effectively in his defense since he was unable to relate key facts, frequently altered his story of what happened, and seemed utterly unconcerned about the possible capital consequences of some of the charges he faced. (A. 25-29.) Dr. Clarence M. Johnson, a psychiatrist appointed pursuant to petitioner's motion, had interviewed petitioner for fifty minutes and examined his past psychiatric record. (A. 10, 35.) The doctor recommended further psychological testing and an electroencephalograph (e.e.g.) monitoring as the basis for a definite diagnosis (A. 36, 38, 40), but these tests were never performed (A. 49-50). In Dr.

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Petitioner's trial began the next day. At the close of the evidence,[13] the trial court instructed the jury on the elements of the crime of rape:

(footnote continued from preceding page)
Johnson's opinion, petitioner exhibited symptoms of temporal lobe seizure disorder due to the childhood blow on the head which, when aggravated by alcohol, might account for petitioner's aggressive behavior, and which might also prevent him from fully cooperating with defense counsel. (A. 38-39.) In his report, Dr. Johnson concluded that " 'it appears we are dealing with an underlying psychiatric disorder.' " (A. 40.) He emphasized, however, that in the absence of further examination and analysis, he could not even express an opinion as to whether petitioner "knows right from wrong" (A. 51) and would be capable of cooperating in his defense. The State presented the testimony of the Sheriff, two deputy sheriffs, and the warden and a medical technician at the Ware Correctional Institution, all of whom had observed petitioner in custody. (A. 51-68.) These witnesses stated that petitioner appeared to them to be mentally competent and capable of understanding the proceedings against him. (A. 54, 61, 65, 68.) The trial court instructed the jury that it was petitioner's burden to satisfy them by a preponderance of the evidence that he was presently incapable of understanding the nature and object of the proceedings against him (A. 70-73):

> "Now, members of the jury, I charge you that the question raised by the defendant's special plea of insanity in this trial is not whether the defendant can distinguish between right and wrong, but whether or not he is capable at this time and at the time of his trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings and is capable of rendering his attorney such assistance as a proper defense to this indictment preferred against him demands."

(A. 73.) The jury returned a verdict stating, "We the Jury find the defendant, Ehrlich Anthony Coker, competent." (A. 75.)

[13]Petitioner presented one witness, Dr. Clarence M. Johnson, who again testified that his interview and evaluation of petitioner were "inconclusive" and that "further testing was indicated." (A. 229.) He stated that he simply could not determine whether petitioner "was able to judge between right and wrong," and could not rule out the possibility of brain damage (A. 233, 234) on the basis of his examination. He added that the temporal lobe seizure disorder that he suspected petitioner was subject to could be "objectively or physically demonstrated or precluded" by electroencephalographic or intoxointerviewing techniques. (A. 234.)

> "Now, I charge you that a person commits rape when he has carnal knowledge of a female forcibly and against her will.
>
> Carnal knowledge and rape occurs when there is any penetration of the female sex organ by the male sex organ.
>
> No conviction shall be had for rape on the unsupported testimony of the female.
>
> Testimony of the female must be corroborated by other competent evidence."

(A. 251.) The court also instructed the jury on petitioner's general plea of insanity.[14] The jury found petitioner guilty as charged on all five counts. (A. 254.)

[14]The trial judge instructed the jury that a defendant was presumed sane but that upon the introduction of "some competent evidence of insanity" (A. 247) the State was obligated to prove sanity beyond a reasonable doubt. The jury was obligated to find petitioner not guilty by reason of insanity if it found either that he was unable to distinguish between right and wrong or that he was subject to a "delusional compulsion" at the time of the crime:

> "Now, ladies and gentlemen of the jury, I charge you that the test of criminal responsibility in this State is that if a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. And there has been but one recognized exception – delusional compulsion. Our law provides a person shall not be found guilty of a crime when at the time of the act, omission or negligence constituting the crime, such person, because of mental disease, injury or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.
>
> "Now, in this State no cognizance is taken of what has been termed impulsive or emotional insanity, where a criminal act is done under some overwhelming and irresistible impulse, unless it be that such impulse is the result of a mental disease or mental defect overriding reason and judgment and obliterating the sense of right and wrong so as to fall within the generally accepted right and

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A hearing was convened the following day to determine sentence on the potentially capital rape and armed robbery charges. The State introduced evidence of petitioner's prior murder conviction, three rape convictions, one kidnapping conviction, and two aggravated assault convictions, *see* note 2 *supra.*[15]

(footnote continued from preceding page)

wrong test, or the exception above referred to of delusional compulsion. Nor under our law is any recognition taken of so-called moral insanity, or of an irresponsibility from a lack of ability to control the will from the habit of indulgence; nor [sic] mental abnormality, mere weak mindedness, unless amounting to imbecility or idiocy, which, like lunacy or insanity, may be held to deprive the offender of the sense of right and wrong. Now, the defendant being impressed with delusions of [sic] hallucinations is not enough. His criminal act must stem from such mental disease, injury or congenital deficiency, or else his accountability for the criminal act is measured by the general test of whether he could at the time of the crime's commission distinguish right from wrong."

(A. 248-249.)

[15]A former investigator for the Richmond County Sheriff's Office testified that he had been the first to discover and minister to Susan Lorrine Jones (two of petitioner's prior rape convictions, the kidnapping conviction, and the aggravated assault conviction stemmed from assaults on this victim during a continuing incident in which she was transported across a county line):

"At this time when I found her and photographed her she was in very severe condition, very, very, bad condition. She had been found on the edge of a road. I also have photographs of where I investigated that scene where her body was left completely beaten and left apparently for dead, with no clothes on, and carried back into these woods approximately fifty feet."

(A. 280.) This testimony was probably meant to be withdrawn from the jury's consideration as improperly admitted. It was originally introduced over petitioner's repeated objection (A. 279); subsequent objections on the same ground eventually produced a ruling by the court that the testimony of the former investigator was to be limited to identification of petitioner as

(continued)

On the rape count, the trial court charged the jury that it "may consider" (A. 298) as statutory aggravating

(footnote continued from preceding page)

the person who had previously been convicted under specified indictments (A. 284); and the jury was so instructed. Nevertheless, petitioner's motions for a mistrial were overruled (A. 285, 292), and this damaging, inadmissible evidence was permitted to remain in the record without even a clear and specific instruction to the jury to disregard it. (*See* A. 278-290.)

A presentence investigation report which was never introduced at all before petitioner's sentencing jury contains the following description:

"State's Version:

According to information received, the defendant did on July 29, 1972 have sexual intercourse with the complainant, Susan Lorraine [sic] Jones, forcibly and against her will, within the premises of the Hudson Oil Company located at 1831 Gordon Highway, Augusta, Georgia.

"Upon further investigation, it was discovered that the defendant and co-defendant, Glenn Harlan Stacy, removed the complainant from a telephone booth against her will and forced her to go with him to the Hudson Oil Company at which time she was forcibly raped. Afterwards the defendant, Coker, put co-defendant, Stacy, out alongside the road and took the complainant to Wilkes County, Georgia where she was further beaten and molested. She was found later in a wooded area very badly beaten and at the point of death.

"Upon reviewing photographs that were taken in reference to this case, the complainant, Susan Lorraine [sic] Jones, was put through a living Hell. She had bruises and black eyes with a distorted face which made her look like some kind of freak. Having been drug through brush and along the ground in her state of nakedness, the skin was literally scraped from her body and she was a raw mass of flesh, along her breast and chest cavity and shoulders.

"Co-defendant, Glenn Harlan Stacy, was also indicted along with the defendant, Anthony Coker, but as of this date disposition in his case is still pending."

(A. 261.) We have included these two matters in our brief in anticipation of the respondent's reliance on them although they are not properly part of the record of evidence that may be considered in reviewing the death sentence imposed upon petitioner by the jury's sentencing verdict.

circumstances justifying imposition of the death penalty[16] (1) whether the offense of rape was committed by a person with a prior record of conviction for a capital felony, and (2) whether the offense was committed while the offender was committing another capital felony (armed robbery).[17] (A. 299.) The trial court instructed that "of course, you are under no circumstances required to impose the death sentence, regardless of any aggravating circumstances" (*ibid.*), because the jury could find that "mitigating circumstances" predominated:

> "mitigating circumstances are those that do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability of punishment [sic]."

(A. 300.) The court also charged that the State must prove aggravating circumstances beyond a reasonable doubt. (A. 298.) The jury's verdict on the rape count was "Death by Electrocution", and it found both of

[16]On the armed robbery count, the trial court instructed the jury that it "may consider" as a statutory aggravating circumstance justifying imposition of the death penalty for armed robbery, whether the offense was committed by a person with a prior record of conviction for a capital felony. (A. 298.) The jury's punishment verdict on the armed robbery count was "Recommend Mercy for the Defendant." (A. 314.)

[17]"Now, as to Count 2, wherein the defendant has been found guilty of Rape you may consider one or more of the following statutory aggravating circumstances, which you must find existed beyond a reasonable doubt before the death penalty can be imposed under Count 2: 1. The offense of Rape was committed by a person with a prior record of conviction for capital felony. 2. The offense of Rape was committed while the offender, the defendant, was engaged in the commission of another capital felony, to wit: The Armed Robbery of Allen Carver, as charged in Count 1 of the indictment." (A. 298-299.)

the aggravating circumstances which the trial court had submitted to it. (A. 315.)[18]

On December 4, 1974, the trial court entered a death sentence on the rape count and a sentence of life imprisonment on the armed robbery count. It consecutively sentenced petitioner to twenty years imprisonment on the kidnapping count, seven years imprisonment on the motor vehicle theft count, and five years imprisonment on the escape count. (A. 316-321.)

On May 20, 1975, the Supreme Court of Georgia affirmed petitioner's convictions and sentences, with Mr. Justice Gunter dissenting. (A. 332-343.)

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

On November 11, 1974, petitioner filed a pretrial Motion to Quash the indictment on the ground that the statutory authorization of the death penalty for rape "is unconstitutional in that it constitutes cruel and unusual punishment per se and as applied to defendant

[18]The punishment verdict form given to the jury for this count contained three alternatives: "1. Death by Electrocution 2. Recommend Mercy For the Defendant 3. Recommend That The Judge Impose Sentence." (A. 315.) The jury drew a line through the second and third alternatives. (*Ibid.*) The form also stated "If death is recommended and fixed as punishment, complete the following: We further find the following aggravating circumstances:", (*ibid.*), and the jury had written in the ensuing blank space: "1. The offense of Rape was committed by a person with a prior record of conviction for a capital felony. 2. The offense of Rape was committed while the offender was engaged in the commission of another capital felony, to wit: The Armed Robbery of Allen Carver as charged in Count I of the indictment." (*Ibid.*)

herein, in violation of the Eight [sic] and Fourteenth Amendments to the Constitution of the United States." (A. 7.) This motion was denied on November 18, 1974 (A. 8), and petitioner assigned the ruling as error in his Enumeration of Error No. 2: "[t]he [trial] Court erred in overruling the appellant's written motion to quash the indictment."

A majority of the Georgia Supreme Court rejected this claim:

> "In his motion, appellant made a general attack on the constitutionality of the Georgia Death Penalty Statute, Ga. L. 1973, pp. 159, 163 (Code Ann. §27-2534.1). This statute has been repeatedly upheld by a majority of this court. See *Coley v. State*, 231 Ga. 829, 933, 204 S.E.2d 612; *Eberheart v. State*, 232 Ga. 247, 206 S.E.2d *Hooks v. State*, 233 Ga. 149, 210 S.E.2d 668; *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (decided April 9, 1975). We affirm those rulings here."

Coker v. State, 234 Ga. 555, 216 S.E.2d 782, 788 (1975) (A. 334).

SUMMARY OF ARGUMENT

The Eighth Amendment forbids punishments which are grossly excessive and disproportioned to the offense. While the rape of an adult woman is a serious crime, it almost nowhere except in Georgia viewed today as warranting the punishment of death. That the use of the death penalty for the crime of rape has been overwhelmingly repudiated by evolving standards of decency is indicated (A.) by the minute number of statutes imposing the death penalty for rape which were enacted after this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), (B.) by the minuscule

number of persons now under sentence of death for this crime, and (C.) by the accelerating historical trend towards abandonment of death as a punishment for rape in the United States and throughout the world. By a unanimous concurrence of the relevant objective indicators of contemporary societal values, capital punishment for rape is excessive. It therefore violates the Eighth Amendment.

ARGUMENT

I.

INTRODUCTION

In its decisions upholding some forms of capital punishment on July 2, 1976, the Court undertook to "consider whether the punishment of death is disproportionate to the crime for which it is imposed." *Gregg v. Georgia*, 428 U.S. ___, 49 L.Ed.2d 859, 882 (1976) (plurality opinion).[19] It answered that question in the negative in those cases, after noting carefully that "we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender," *ibid.*[20]

[19]The term "plurality opinion" will hereinafter designate the opinions of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court in the five capital punishment cases decided on July 2, 1976 (*Gregg v. Georgia*, 428 U.S. ___,49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. ___, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. ___, 49 L.Ed.2d 927 (1976); *Woodson v. North Carolina*, 428 U.S. ___, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. ___, 49 L.Ed.2d 974 (1976)). The opinions of Mr. Justice White in the respective cases, joined by the Chief Justice and by Mr. Justice Rehnquist, will be designated hereinafter as "opinion of Mr. Justice White."

[20](Footnote omitted.) The opinion of Mr. Justice White also carefully confined itself to a decision "whether the death penalty imposed for murder" is constitutional, *Gregg v. Georgia, supra* 49 L.Ed.2d at 893 (opinion of Mr. Justice White); *see also id.* at 901.

The question was explicitly reserved "whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life – for example, when capital punishment has been imposed for rape . . . that does not result in the death of any human being." *Id.* at 882 n.35 (plurality opinion).

That question is presented in this case. Petitioner Ehrlich Anthony Coker stands condemned for an offense of rape[21] in which the victim was neither killed nor subjected to serious physical injury. *See* pages 18-22 *supra.* We submit that the death penalty for such a crime is an unconstitutionally cruel and unusual punishment.

II.

DISPROPORTIONALITY AS A MEASURE OF CRUEL AND UNUSUAL PUNISHMENT

It was no accident that the Court felt obliged *sua sponte* to inquire into the question of proportionality before sustaining the death penalty for murder in the

[21]Throughout this brief, "rape" will refer to that crime when it is not attended by the death of the victim. When the victim dies, the crime is invariably punishable as felony-murder; and in many jurisdictions, the fact that death occurred during the course of a rape may be an "aggravating circumstance" which may be grounds for imposition of the death penalty, *see, e.g.*, Ga. Code Ann. §27-2534.1(b)(1) (1975 supp.); Fla. Stat. Ann. §921.141(5)(d) (1975-76 supp.). Under Georgia law, however, a death sentence may not be imposed for both rape and rape-murder if these crimes are perpetrated on the same victim, *see Gibson v. State,* ___ Ga. ___, 226 S.E.2d 63 (1976) (vacating death sentence for rape because that crime was predicate of felony-murder conviction; affirming death sentence for felony-murder).

Gregg, Proffitt and *Jurek* cases. Such an inquiry is basic to "those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[22] Restraints upon disproportionate punishment[23] run deep in the Anglo-American tradition;[24] and

[22]*Weems v. United States,* 217 U.S. 349, 366-367 (1910).

[23]Justice Field's dissenting opinion in *O'Neil v. Vermont,* 144 U.S. 323, 339-340 (1892), speaks of the "inhibition against all punishments which by their excessive . . . severity are greatly disproportioned to the offenses charged." O'Neil, a New York liquor dealer, had been convicted of 307 separate offenses of the illegal sale of liquor in Vermont and had been given a cumulative sentence of fifty-four years imprisonment. Justices Harlan and Brewer agreed with Justice Field that O'Neil's sentence was excessive "in view of the character of the offences committed." *Id.* at 366, 371. The majority of the Court declined to reach the merits of the question because it was not properly presented and because the Eighth Amendment was not then viewed as a restraint upon the States. *Id.* at 331-332. ***But see Robinson v. California,*** 370 U.S. 660 (1962).

[24]Magna Carta contains three chapters requiring that amercements (discretionary fines) be proportioned to the measure of magnitude of offenses. MAGNA CARTA, Ch. 20-22 (1215), printed in ADAMS & STEPHENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 42, 45 (1926). Granucci sets forth at length the English history of the restriction on disproportionate punishments, Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 CAL. L. REV. 839, 844-847 (1969). The Cruel and Unusual Punishments Clause of the English Bill of Rights of 1689, from which the similar provision of the Eighth Amendment was taken verbatim, was in large part "a reiteration of the English policy against disproportionate penalties." *Id.* at 860.

The concept has, of course, survived to this day in England. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 80 (1968):

> "There are many different ways in which we think it morally incumbent on us to *qualify* or *limit* the pursuit of

(continued)

their expression in the Eighth Amendment[25] was a principal ground of decision in the oft-cited case of *Weems v. United States*, 217 U.S. 349 (1910).[26]

Weems, a United States Coast Guard disbursing officer for the Port of Manila, was sentenced to fifteen

(footnote continued from preceding page)

the utilitarian goal by the methods of punishment. Some punishments are ruled out as too barbarous or horrible to be used whatever their social utility; we also limit punishments in order to maintain a scale for different offences which reflects, albeit very roughly, the distinction felt between the moral gravity of these offences. Thus we make some approximation to the ideal of justice of treating morally like cases alike and morally different ones differently." (Emphasis in original.)

[25]In addition to their English heritage, *see* note 24 *supra*, the Framers were influenced by the writings of such Enlightenment philosophers as Beccaria, Montesquieu, Voltaire, and Locke, who provided a natural law rationale for the principle of proportionality of punishment. *See* Schwartz & Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 782, 806-815 (1975). "Beccaria ['s] essay *On Crimes and Punishments* helped shape our Fifth and Eighth Amendments." BRANT, THE BILL OF RIGHTS 464 (1951). *See also* RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 21 (1962); *Ullman v. United States*, 350 U.S. 422, 450 (1956) (dissenting opinion of Mr. Justice Douglas). *See generally*, Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145 (1967).

[26]The opinion of the Court in *Weems* was announced by Justice McKenna and was joined by Justice Harlan, Justice Day and Justice Moody. Justice White announced a dissenting opinion, in which Justice Holmes joined.

years of the *cadena temporal*[27] for falsely entering outlays in his cashbook. *Id.* at 357-358. This Court struck down the punishment as cruel and unusual.[28] While the sentence imposed on Weems was harsh and outlandish in nature, its condemnation by the Court rested expressly upon its excessiveness for the crime of falsifying public records,[29] and its consequent lack of "adaptation of punishment to the degree of crime." *Id.*

[27]The *cadena temporal*, which derived from the Penal Code of Spain, 217 U.S. at 363, was a combination of punishments including a large fine, imprisonment at hard labor for a specified period (in *Weems*, fifteen years), with " 'no assistance whatsoever from without the institution,' " 217 U.S. at 464, " 'always carry[ing] a chain at the ankle, hanging from the wrists,' " *ibid.*, civil interdiction, permanent forfeiture of civil and political rights, and subjection to official surveillance for life, *ibid.*

[28]The Court noted that the sentence "excite[s] wonder in minds accustomed to a more considerate adaptation of punishment to the degree of crime . . . [T]he law in controversy seems to be independent of degrees." 217 U.S. at 365. Justice McKenna explicitly adopted Justice Field's dissenting opinion in *O'Neil v. Vermont*, *supra*, that the "inhibition [of the Eighth Amendment] was directed not only against punishments which inflict torture, 'but against all punishments which, by their excessive length or severity, are greatly disproportioned to the offense charged.' " 217 U.S. at 371.

[29]"It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind. And they would have those bad attributes even if they were found in a Federal enactment and not taken from an alien source." 217 U.S. at 377.

at 365.[30] In *Gregg v. Georgia, supra,* 49 L.Ed.2d at 873 (plurality opinion), *Weems* was accordingly construed as rejecting "the proposition that the Eighth Amendment reaches only punishments that are 'inhuman and barbarous, torture and the like.' . . . Rather [*Weems*] . . . focused on the lack of proportion between the crime and the offense." That focus was a necessary corollary of the constitutional requirement that "[a] penalty must . . . accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' *Trop v. Dulles,* [356 U.S. 86, 100 (1958)] . . . (plurality opinion). This means, at least, that the punishment not be 'excessive.' . . . [And] the inquiry into excessiveness [implies not only that] . . . the punishment must not involve the unnecessary and wanton infliction of pain [but also that] . . . the punishment must not be grossly out of

[30]*See also Downey v. Perini,* 518 F.2d 1288 (CA6) *vacated and remanded for reconsideration in light of new Ohio statute,* 423 U.S. 993 (1975); *Hart v. Coiner,* 483 F.2d 136 (CA4 1973); *Ralph v. Warden,* 438 F.2d 786 (CA4 1970); *Roberts v. Collins,* 404 F. Supp. 119 (D. Md. 1975); *Adams v. Carlson,* 368 F. Supp. 863 (E.D. Ill. 1973). State courts, too, have recognized the principle that excessiveness will bring a penalty within the ban of constitutional prohibitions of cruel and unusual punishment. *See, e.g., People v. Schueren,* 10 Cal.3d 533, 11 Cal. Rptr. 129, 516 P.2d 833 (1973); *In re Lynch,* 8 Cal.3d 410, 105 Cal. Rptr. 217, 503 P.2d 921 (1972); *State v. Evans,* 73 Idaho 50, 245 P.2d 788 (1952); *Dembowski v. State,* 251 Ind. 250, 240 N.E.2d 815 (1968); *Workman v. Commonwealth,* 429 S.W.2d 374 (Ky. 1968); *Garvey v. Whitaker,* 48 La. Ann. 527, 19 So. 457 (1896); *McDonald v. Commonwealth,* 183 Mass. 322 (1899); *People v. Lorentzen,* 387 Mich. 167, 194 N.W.2d 817 (1972); *Territory v. Ketchum,* 10 N. Mex. 718, 65 P. 169 (1901) (dictum); *Cannon v. Gladden,* 203 Ore. 629, 281 P.2d 233 (1955); *State v. Kimbrough,* 212 S.C. 348, 46 S.E.2d 273 (1948); *Calhoun v. State,* 85 Tex. Crim. 496, 214 S.W. 335 (1919).

proportion to the severity of the crime." 49 L.Ed.2d at 874 (plurality opinion).

To state that the Eighth Amendment outlaws punishments which are grossly disproportionate to offenses is, however, only the beginning of the relevant inquiry here. For the crime of rape – like other crimes involving violence or the risk of violent injury, such as aggravated assault, attempted murder, arson, burglary, robbery, and kidnapping – is a serious and dangerous offense, intuitively distinguishable from the making of false entries in an official account book. While rape has historically been perceived as less reprehensible than murder, *see* pages 46-48 *infra,* it is indisputably a grave crime, deserving stringent punishment. And the constitutional concept of adaptation does not require that the punishment fit the crime with mathematical precision. Neither legislatures nor courts, nor the sciences of penology, are equipped for that kind of exact measurement.[31]

On the other hand, what is at issue in this case is the "unique and irreversible penalty of death," *Woodson v. North Carolina,* 428 U.S. ___, 49 L.Ed.2d 944, 951 (1976) (plurality opinion) (footnote omitted). It "cannot fairly be denied . . . that death is a punishment different from all other sanctions in kind rather than degree [or that] . . . the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment" for a particular crime, *id.* at 961 (footnote omitted).

[31]*See* Packer, *Making the Punishment Fit the Crime,* 77 HARV. L. REV. 1071, 1078-1080 (1964).

The question whether a crime may be punished with death as opposed to imprisonment is therefore qualitatively different, under the Eighth Amendment, than the question whether a crime may be punished with a greater rather than a lesser term of imprisonment.[32] For just as the Cruel and Unusual Punishments Clause restricts a State's power to impose the extreme penalty arbitrarily, *Furman v. Georgia*, 408 U.S. 238 (1972), and without due consideration of the aggravating and mitigating characteristics of the particular offender and offense, *Woodson v. North Carolina, supra*; *Roberts v. Louisiana*, 428 U.S. ___, 49 L.Ed.2d 974 (1976), so also does it forbid a State blindly and arbitrarily to ignore gradations in the gravity of crimes when it authorizes the infliction of the extreme penalty of death.

III.

THE DISPROPORTIONALITY OF DEATH AS A PUNISHMENT FOR RAPE

We submit that Georgia has plainly violated that Eighth Amendment principle here. Alone among American States today – and virtually alone among the jurisdictions of the civilized world – Georgia has seen fit to authorize the imposition of the death penalty for the crime of rape of an adult woman. Even in Georgia the extreme penalty for that crime is actually meted out in only an insignificant handful of arbitrarily selected cases. If petitioner is put to death for rape, he will die in the face of an extraordinary national and international consensus repudiating death as the punishment for his crime.

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[32]The question presented here is thus distinguishable from that presented in *Badders v. United States*, 240 U.S. 391 (1916).

This Court has said that the assessment of the constitutionality of a particular punishment under the Eighth Amendment "does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction." *Gregg v. Georgia, supra*, 49 L.Ed.2d at 874 (plurality opinion). The relevant "indicia of societal values . . . include history and traditional usage, legislative enactments, and jury determinations." *Woodson v. North Carolina, supra*, 49 L.Ed.2d at 951-952 (plurality opinion) (footnotes omitted). In the subsections that follow, we consider first the latter "two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society," *id.* at 954: "legislative enactments" and "jury determinations," *ibid.* We then advert to the lessons of history and tradition which give these indicators meaning in a broader context.

A. Legislative Enactments

If "[t]he most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman* [enactment by thirty-five States of laws authorizing the death penalty for various forms of homicide]," *Gregg v. Georgia, supra*, 49 L.Ed.2d at 878 (plurality opinion), then the most striking proof of contemporary society's repudiation of the death penalty for rape is the minuscule number of states that have adopted legislation authorizing the death penalty for any form of rape in the wake of *Furman*. In 1926, twenty American jurisdictions (eighteen States, the federal government, and the District of Columbia) provided the death penalty as a

possible punishment for the rape of an adult female.[33] By 1971, this number had decreased to seventeen.[34] In all seventeen jurisdictions, the death penalty for rape was imposed at the unfettered discretion of the jury or the trial court; hence *Furman v. Georgia*, 408 U.S. 238 (1972), invalidated each of these statutes. Following *Furman*, only Georgia, North Carolina, and Louisiana enacted statutes authorizing the death penalty for the rape of an adult female.[35] In the latter two States, only limited categories of rapes were made capital.[36]

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[33]Bye, *Recent History and Present Status of Capital Punishment in the United States*, 17 J. CRIM. L. 234, 241-242 (1926).

[34]Ala. Code, tit. 14, §395 (1958 recomp. vol.); Ark. Stat. Ann. §41-4303 (1964); Fla. Stat. Ann. §794.01 (1965); Ga. Code Ann. §26-2001 (1970 rev. vol.); Ky. Rev. Stat. Ann. §§435.080-435.090 (1963); La. Rev. Stat. Ann. §14:42 (1950); Md. Code Ann. § 27-461 (1957); Miss. Code Ann. § 2358 (1956 recomp. vol.); Vernon's Mo. Stat. Ann. § 559.260 1953); Nev. Rev. Stat. § 200.363 (1967) (rape with substantial bodily harm); N.C. Gen. Stat. § 14-21 (1953); Okla. Stat. Ann., tit. 21, §1115 (1958); S.C. Code Ann. §§ 16-72, 16-80 (1962); Tenn. Code Ann. § 39-3702 (1955); Vernon's Tex. Penal Code Ann. § 1189 (1961); Va. Code Ann. § 18.144 (1960 repl. vol.); 18 U.S.C.A. § 2031 (1970).Original Meaning, 57 CAL. L. REV. 839, 844 (1969).

[35]Ga. Code Ann. §27-2534.1 (1975 supp.); N.C. Gen. Stat. §14-21 (1975 cum. supp.); La. Rev. Stat. §14:42 (1974).

[36]Prior to *Furman v. Georgia*, 408 U.S. 238 (1972), the death penalty was authorized generally for rape in North Carolina and was imposed at the discretion of the sentencing jury:

> "Every person who is convicted at ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

N.C. Gen. Stat. §14-21 (repl. vol. 1969). The decision of the Supreme Court of North Carolina in *State v. Waddell*, 282 N.C.

(continued)

Florida, Mississippi, and Tennessee, it should be noted, also enacted post-*Furman* statutes authorizing

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431, 194 S.E.2d 19 (1973), made the death penalty mandatory for all rape offenses defined by §14-21. In 1974, however, the North Carolina legislature enacted N.C. Sess. Laws 1973, c. 1201, §2 (1974 sess.), which provided a new §14-21, splitting the old rape offense into a new capital "First-Degree Rape" and a new non-capital "Second-Degree Rape":

> "Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:
>
> (a) First-Degree Rape –
>
> (1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or
>
> (2) If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.
>
> (b) Second-Degree Rape – Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

In Louisiana, the crime of rape is defined by La. Rev. Stat. §14:41 (1974):

> "Rape is the act of sexual intercourse with a female person not the wife of, or judicially separated from bed and board from, the offender, committed without her lawful consent. Emission is not necessary; and any sexual penetration, however slight, is sufficient to complete the crime."

However, the death penalty is authorized only for "Aggravated Rape":

> "Aggravated rape is a rape committed where the sexual intercourse is deemed to be without the lawful consent of

(continued)

the death penalty for certain rapes of children by

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the female because it is committed under any one or more of the following circumstances:

(1) Where the female resists the act to the utmost, but her resistance is overcome by force.

(2) Where she is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.

(3) Where she is under the age of twelve years. Lack of knowledge of the female's age shall not be a defense.

Whoever commits the crime of aggravated rape shall be punished by death."

La. Rev. Stat. §14:42 (1974). The penalty for "Simple Rape" is one to twenty years imprisonment:

"Simple rape is a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:

(1) Where she is incapable of resisting or of understanding the nature of the act, by reason of stupor or abnormal condition of the mind produced by an intoxicating, narcotic or anesthetic agent, administered by or with the privity of the offender; or when she has such incapacity, by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of her incapacity.

(2) Where she submits under the belief that the person committing the act is her husband and such belief is intentionally induced by any artifice, pretense, or concealment practiced by the offender.

(3) Where she is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act; and the offender knew or should have known of her incapacity.

Whoever commits the crime of simple rape shall be imprisoned at hard labor for not less than one nor more than twenty years."

La. Rev. Stat. §14:43 (1974). (In 1975, La. Acts 1975, No. 612, was enacted which slightly revised the definition in §14:41 as "Rape; heterosexual," added a new §14:41.1 defining "Rape; homosexual," and revised §14:42 to provide the death penalty for aggravated homosexual rape.)

adults.[37] But the North Carolina and Louisiana statutes were effectively invalidated by *Woodson v. North Carolina* and *Roberts v. Louisiana*;[38] and, when the Louisiana legislature enacted a new death penalty law applying to first degree murder on August 1-2, 1976,[39]

[37]Fla. Stat. Ann. §794.011(2) (1975-1976 supp.) (death penalty authorized for person eighteen years of age or older who commits a "sexual battery" upon a "person" eleven years of age or younger); Miss. Code Ann. §97-3-65 (1974) (death penalty authorized for person eighteen years of age or older who rapes a female twelve years of age or younger); Tenn. Code Ann. §39-3702 (1974) (death penalty authorized for person eighteen years of age or older who rapes a female twelve years of age or younger).

[38]*See, e.g., Dull v. North Carolina,* 428 U.S. ____, 49 L.Ed.2d 1211 (1976), *vacating State v. Dull,* 289 N.C. 55, 220 S.E.2d 344 (1975); *Selman v. Louisiana,* 428 U.S. ____, 49 L.Ed.2d 1212 (1976), *vacating Selman v. State,* 300 So.2d 467 (La. 1974); *Watts v. Louisiana,* 428 U.S. ____, 49 L.Ed.2d 1212-1213 (1976), *vacating Watts v. State,* 320 So.2d 146 (La. 1976).

[39]On August 1 and 2, 1976, the Louisiana legislature amended that state's first degree murder statute, La. Rev. Stat. Ann. §14:30 (1974), which provided a mandatory death penalty for first degree murder. *See Roberts v. Louisiana, supra.* It enacted La. Act 1976, No. 316 (S.B. 196) (Aug. 1, 1976), effective Oct. 2, 1976, which repealed the mandatory death penalty for first degree murder and provided alternative penalties of death or life imprisonment for this crime. It also enacted La. Acts 1976, No. 694 (H.B. 1507) (Aug. 2, 1976), effective Oct. 2, 1976, which provided new procedures for selecting the penalty of death or life imprisonment in first degree murder cases. The Legislature did not, however, enact similar provisions to modify Louisiana's aggravated rape statute, La. Rev. Stat. Ann. §14:42 (1974), *see* note 36 *supra,* leaving the State without any post-*Gregg* death penalty for rape.

it did not reenact the death penalty for the crime of aggravated rape.[40]

Thus, like the *cadena temporal*, Georgia's death penalty for rape now "has no fellow in American legislation," *Weems v. United States, supra*, 217 U.S. at 377. The observation made half-a-dozen years ago, of

[40]Although two persons have been condemned for "sexual battery" under Fla. Stat. Ann. §794.011(2) (1975-1976 supp.), *see* note 41 *infra*, their appeals have not yet been heard by the Supreme Court of Florida. This Court has upheld the constitutionality of a death sentence for first degree murder imposed under Florida's capital procedures. *Proffitt v. Florida*, 428 U.S. ____, 49 L.Ed.2d 913 (1976).

Tennessee's capital rape statute provides a mandatory death penalty: "Whoever is convicted of the rape of any female under twelve years of age shall suffer death by electrocution." Tenn. Code Ann. §39-3702 (1975 repl. vol.). No defendant is now on Death Row for this crime. Constitutional challenges to Tennessee's mandatory death penalty for first degree murder are now pending in the Supreme Court of Tennessee, *see, e.g., Collins v. State*, Tenn. Sup. Ct. No. 63 (Hamblen County).

On October 5, 1976, the Supreme Court of Mississippi ruled that the State's mandatory death penalty for capital murder was unconstitutional in the light of *Woodson v. North Carolina, supra*, and *Roberts v. Louisiana, supra*. *Jackson v. State*, 337 So.2d 1242 (Miss. 1976). It remanded the case for a new trial under judicial guidelines for the imposition of the death penalty and ruled that "justice demands that the persons convicted and sentenced to death prior to our holding today should have the benefit of all the guidelines outlined herein." 337 So.2d at 1257. Mississippi's post-*Furman* capital rape statute provided a mandatory death penalty for rapes perpetrated against female children: "Every person eighteen (18) years of age or older who shall be convicted of rape by carnally and unlawfully knowing a female child under the age of twelve (12) years, upon conviction, shall be sentenced to death." At the time of the Mississippi Supreme Court's *Jackson* decision, one white defendant had been condemned for rape. *State of Mississippi v. Terrence Upshaw*, Hinds County (Miss.) Cir. Ct. No. 0-421 (death sentence imposed May 18, 1976).

"a legislative trend to abolish capital punishment for this crime," *Ralph v. Warden*, 438 F.2d 786, 793 (CA4 1970), has proved prophetic. And if the reenactment of thirty-five statutes punishing murder with death after *Furman* indicates the public's acceptance of capital punishment for murderers, then, by an ineluctable logic, the legislative response to *Furman* indicates that "a large proportion of American society [does not] continu[e] to regard . . . [capital punishment] as an appropriate and necessary criminal sanction" for rape. *Gregg v. Georgia, supra*, 49 L.Ed.2d at 878 (plurality opinion).

B. Jury Determinations

There are almost as few persons condemned for rape in the United States today as there are statutes which make rape a "capital" offense. So far as we can tell, petitioner is one of five persons in the entire country now under sentence of death for rape; and two of these were condemned under a statute limited to the rape of children.[41] While a somewhat larger number of defendants was condemned for rape under the now-defunct mandatory death penalty statutes enacted in

[41]John Wallace Eberheart (*Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12 (1974) (rape), pending on petition for certiorari as *Eberheart v. Georgia*, No. 74-5174); John Wesley Hooks (*Hooks v. State*, 233 Ga. 149, 210 S.E.2d 668 (1974) (rape), pending on petition for certiorari as *Hooks v. Georgia*, No. 74-5954); Clarence R. Purdy (*State of Florida v. Clarence R. Purdy*, Lake County (Fla.) Cir. Ct. No. 74-561 (Feb. 12, 1975) (sexual battery of a child), pending on appeal to Florida Supreme Court as No. 47,074); Benjamin F. Huckaby (*State of Florida v. Benjamin F. Huckaby*, Volusia County (Fla.) Cir. Ct. No. 74-833-B (June 26, 1975) (sexual battery of a child), pending on appeal to Florida Supreme Court as No. 47,736).

North Carolina and Louisiana following *Furman*, that number was still not large. Specifically, fourteen persons were condemned for rape in Louisiana, and eight in North Carolina, during the period between *Furman* and *Gregg*.[42] Numbers in these dimensions under supposedly *mandatory* capital-punishment statutes obviously do not manifest public acceptance of the death penalty for rape, but rather its extreme opposite. And the fact that only three defendants are now under sentence of death for rape in Georgia – despite the circumstance that Ga. Code Ann. §27-2534.1 has been in effect for more than three years and authorizes the death penalty for a wide range of rape offenses – is a strikingly clear indication that death as a punishment for rape has been publicly repudiated even in that State.

We have been able to find forty-two cases in which the Supreme Court of Georgia has reviewed rape convictions since enactment of the State's 1973 death-penalty statute.[43] In only four of these was a death sentence imposed.[44] Moreover, it must be remembered that, while all death-sentence cases are automatically reviewed by the Georgia Supreme Court under Ga. Code Ann. §27-2537, rape convictions punished by imprisonment are not subject to an automatic appeal. The *visible* record of Georgia juries in rejecting capital punishment for defendants convicted of rape – a rejection ratio of better than nine-to-one – therefore doubtless understates the true ratio. Nevertheless, even these figures are a weighty testimonial to the

[42]Brief for Petitioner in *Roberts v. Louisiana, supra* [No. 75-5844], Appendix A, at 1a-4a (filed Feb. 22, 1976); Brief for Petitioner in *Woodson v. North Carolina, supra*, [No. 75-5491], Appendix A, at 42-46 (filed Feb. 22, 1976) [No. 75-5491].

[43]*See* Appendix B. *infra*.

[44]*Coley, Eberheart, Hooks*, and the present case.

perceived inappropriateness of capital punishment for rape, upon the assumption that "[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved," *Gregg v. Georgia, supra*, 49 L.Ed.2d at 879 (plurality opinion).

Nor can the infrequency of death verdicts in rape cases be explained satisfactorily upon the theory that the ultimate punishment is being reserved for only the most aggravated rape offenses. To the contrary, numerous rapes that were far more aggravated than petitioner's have resulted in sentences of imprisonment. *See, e.g., Welch v. State*, Ga. Sup. Ct. No. 31374 (Sept. 28, 1976) (rape and forced subjection of the single complainant to unnatural sexual acts by three defendants; conduct described as "torture" and mockery of the complainant; eventual abandonment of the complainant by shoving her naked down a rocky bank into a creek); *Zilinmon v. State*, 234 Ga. 535, 216 S.E.2d 830 (1975) (rape, burglary, "physical abuse," stomping, and threats on complainant's life); *Hammock v. State*, 233 Ga. 733, 213 S.E.2d 618 (1975) (severe beating of complainant); *Crowder v. State*, 233 Ga. 789, 213 S.E.2d 620 (1975) (physical injuries to complainant requiring six stitches); *Woodward v. State*, 234 Ga. 901, 218 S.E.2d 629 (1975) (abduction and beating). Ironically, where a death sentence *was* imposed in a rape case similar in many regards to petitioner's – rape, robbery and abduction, with little physical harm to the complainant, by a defendant who was a prison escapee with a prior capital felony conviction (apparently involving torture of the victim) – the Georgia Supreme Court reduced that sentence to life imprisonment with the otherwise unexplicated observation that "prior cases indicate that the past practice among juries faced with similar factual situations and like aggravating circumstances has been to impose only the sentence of life imprisonment for

the offense of rape, rather than death." *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612, 617 (1974).

The same data referred to in *Woodson v. North Carolina, supra,* 49 L.Ed.2d at 956 (plurality opinion) as "indicating that the percentage of death sentences [among defendants convicted of murder] in many States was well below 20%," show, by comparison, that the percentage of death sentences among defendants convicted of rape was well below 4%.[45] For Georgia specifically, those figures show that there were 299 commitments under conviction for rape between July 1, 1964 and December 31, 1968; whereas, for the five calendar years encompassing these four-and-a-half fiscal years, eight men – or 2.68% – were sentenced to die for rape.[46] Perhaps the reluctance of juries in Georgia and elsewhere during recent decades to impose the death sentence for rape in more than a minute and arbitrarily selected fraction of cases reflects the phenomenon that "[statutory] punishments for rape are simply not in line with public perception of its seriousness."[47] Perhaps it represents a literal and

[45]Brief for Petitioners in *Aikens v. California,* 406 U.S. 813 (1972) [No. 68-5027], Appendix F, at 8f-11f.

[46]*Id.* at 9f.

[47]This was a "possible" conclusion suggested by two researchers who utilized psychophysical scaling techniques to measure the intensity of popular attitudes regarding various crimes and found that "rape without serious harm to the victim, manslaughter, and forcible rape were all rated as roughly equivalent." Hamilton & Rotkin, *Interpreting the Eighth Amendment: Perceived Seriousness of Crime and Severity of Punishment,* in BEDAU & PIERCE, eds., CAPITAL PUNISHMENT IN THE UNITED STATES (1976), at 502, 519. *Cf.* BOWERS, EXECUTIONS IN AMERICA 77 (1974):

> "By most standards, rape is a less serious offense than murder. It has been judged less serious by various population subgroups [citing SELLIN & WOLFGANG,

(continued)

intuitive application of the ancient *lex talionis* principle[48] manifesting itself as an unwillingness to declare life forfeit where no life has been taken.[49] Whatever the explanation, the behavior of juries as an indicator of the "evolving standards of decency that mark the

(footnote continued from preceding page)

> THE MEASUREMENT OF DELINQUENCY (1974)], it has been less severely punished by length of imprisonment [citing Tittle, *Crime Rates and Legal Sanctions,* 16 SOCIAL PROBLEMS 409 (1969), and Chiricos & Waldo, *Punishment and Crime: An Examination of Some Empirical Evidence,* 18 SOCIAL PROBLEMS 200 (1970)], and it has been punishable by death in far fewer jurisdictions both within the United States . . . and abroad [citing Patrick, *The Status of Capital Punishment: A World Perspective,* 56 J. CRIM. L., CRIM. & POL. SCI. 397 (1965)]."

[48]Granucci remarks of the biblical *lex talionis*:

> "It is generally considered a law of retribution–the product of a vengeful deity. Envisioning neither mercy nor mitigation of punishment, the *lex talionis* is, by modern standards, extremely harsh; however, it does prescribe a maximum limit on punishment. '*Talio*' is Latin for 'equivalent to' or 'equal'. That the *lex talionis* requires punishment equal to the crime is made clear by a passage from the Book of Leviticus: 'If a man injures his neighbor, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered.' "

Granucci, "*Nor Cruel and Unusual Punishments Inflicted:*" *The Original Meaning,* 57 CAL. L. REV. 839, 844 (1969).

[49]As Prof. Packer has observed,

> "the retributive justification . . . seems to offer the strongest support for limiting the infliction of the death penalty to homicidal offenses. The command of the lex talionis is a simple one: an eye for an eye, a tooth for a tooth, a life for a life. The negative pregnant is equally simple: where a life has not been taken, a life should not be forfeit. Here is a doctrine of proportionality that can readily be grasped and easily applied, at least when the death penalty is at issue. Seen in that light, proportionality is neither too complicated nor too marginally relevant to be employed as a constitutional ideal."

Packer, *Making the Punishment Fit the Crime,* 77 HARV. L. REV. 1071, 1078 (1964).

process of a maturing society"[50] plainly signifies that rape – although a grave and repugnant crime – is not among those "crimes [which] are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death," *Gregg v. Georgia, supra,* 49 L.Ed.2d at 881.

C. History and Traditional Usage

The present status of the death penalty for rape in this country, described in the preceding subsections insofar as it is reflected in legislative enactments and jury verdicts, takes on added significance in a broader historical and social context. Several points deserve note here.

First, the extreme contemporary rarity of statutes authorizing capital punishment for rape offenses is the end product of a "trend both in this country and throughout the world against punishing rape by death," *Rudolph v. Alabama,* 375 U.S. 889 (1963) Mr. Justice Goldberg, dissenting from denial of certiorari). The "long-term trend away from the death penalty . . . [in] the reduction of the number of capital offenses,"[51] has

[50] *Trop v. Dulles, supra,* 356 U.S. at 100 (plurality opinion).

[51] Hartung, *Trends in the Use of Capital Punishment,* 284 ANNALS 8, 9, (1952).

been steadily occurring since the Eighteenth Century,[52] and has radically diminished the number of American jurisdictions which authorize the death penalty for rape from twenty a-half-century ago to four today (among which, only Georgia provides the death penalty for rape of an adult woman). *See* pages 37-43 *supra.*[53]

Internationally too, the death penalty for rape has atrophied dramatically, to the point of virtually universal abolition among civilized nations.[54] A United

[52] *See* Barrows, *Legislative Tendencies as to Capital Punishment,* 29 ANNALS 618, 620 (1907); McCafferty, *Major Trends in the Use of Capital Punishment,* 25 FED. PROB. 1, 16 (1961, No. 3); DiSalle, *Trends in the Abolition of Capital Punishment,* 1 TOLEDO L. REV. 1, 3-5 (1969); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 352-353 (Avon ed. 1968); Comment, *Cruel and Unusual Punishment–Constitutionality of the Death Penalty for Rape Where Victim's Life Neither Taken Nor Endangered,* 5 U. RICHMOND L. REV. 392, 394 n.18 (1971). For a description of the range of offenses once punished by death in this country, *see* BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 2-3 (1919); BEDAU, ed., THE DEATH PENALTY IN AMERICA 5-7 (rev. ed. 1967).

[53] Within the past decade, both the American Law Institute and the National Commission on Reform of the Federal Criminal Laws have recommended against the authorization of the death penalty for rape. THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW CRIMINAL CODE 307 (1970); AMERICAN LAW INSTITUTE, MODEL PENAL CODE §§213.1, 6.06 (Proposed Official Draft, 1962). *See Ralph v. Warden,* 438 F.2d 786, 791 (CA4 1970).

[54] The Court has considered the international acceptability of a punishment relevant to the question whether the penalty is violative of the Eighth Amendment. In *Trop v. Dulles,* 356 U.S. 86, 102 (1958) (plurality opinion), the Court remarked that the "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime," and it cited a United Nations survey which indicated that only two countries imposed denationalization as a penalty for desertion. *id.* at 103.

Nations survey of more than sixty countries (including most of the major nations of the world) found that by 1965 all but three countries outside the United States had ceased to employ capital punishment for this crime.[55] The three countries retaining the death penalty for rape were China (Taiwan), Malawi, and the Republic of South Africa.[56] A broader but less reliable study in Patrick in 1963 covered 128 countries and found nineteen apart from the United States that authorized capital punishment for rape; but this figure should be reduced by perhaps six on account of errors and

[55]UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) [hereinafter cited as UNITED NATIONS SURVEY] 40, 86. We put aside three countries (Japan, Philippines, Turkey) that punish rape capitally only if it is followed by the victim's death. *Ibid.*

There is a 1975 Report of the Secretary-General on Capital Punishment, CAPITAL PUNISHMENT, REPORT OF THE SECRETARY-GENERAL (E/5616) (1975), and the replies from the individual governments which formed the basis for this report have also been published, CAPITAL PUNISHMENT: INFORMATION FROM GOVERNMENTS COMPILED BY THE UNITED NATIONS SECRETARIAT (ST/SOA/118 (1972) [hereinafter cited as UNITED NATIONS GOVERNMENTS' REPLIES]. Unfortunately, the 1975 Report does not contain an updated list of the countries in the world which impose the death penalty for rape; and the seventy-nine replies from the individual governments do not always reveal what crimes, if any, the government punishes by death. But nothing in either the Report or the replies contradicts the information contained in the 1968 Survey.

[56]The 1960 United Nations survey (UNITED NATIONS SURVEY 40) lists four countries as retaining the death penalty for rape: China (Taiwan), Northern Rhodesia, Nyasaland, and the Republic of South Africa. Nyasaland became Malawi upon its independence in 1964. Northern Rhodesia became Zambia, and abolished the death penalty for rape by 1965. UNITED NATIONS SURVEY 86.

subsequent abolition.[57] Moreover, Patrick's data concerning the actual use of the death penalty suggest that

[57]Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 398-404 (1965). The countries are: Afghanistan, Australia, Basutoland, Bechuanaland, People's Republic of China, Gabon, Jordan, Republic of Korea, Malagasy Republic, People's Republic of Mongolia, Niger, Northern Rhodesia [now Zambia], Nyasaland [now Malawi], Saudi Arabia, Senegal, Sierra Leone, Republic of South Africa, Turkey, and the U.S.S.R. However, Australia and the U.S.S.R., which Patrick lists, do not authorize the death penalty for rape according to the 1968 United Nations survey. Turkey, which Patrick also lists, was found by the United Nations to punish rape with death only if the rape victim dies. On the other hand, Patrick does not list China (Taiwan), as the United Nations survey does. These errors decrease Patrick's by a total of two. Moreover, Zambia [formerly Northern Rhodesia] abolished the death penalty for rape by 1965, *see* note 56 *supra.* Patrick's total of nineteen countries must therefore be reduced by at least three. Also, the responses from United Nations countries which formed the basis of the 1975 Secretary-General's report on the death penalty, while sketchy, incomplete, and in some cases ambiguous, indicate that three more of the jurisdictions listed by Patrick may have abolished the death penalty for rape. The response from Afghanistan stated that the death penalty has been reserved for "premeditated political and military crimes." UNITED NATIONS GOVERNMENTS' REPLIES at 5. The response from Jordan implied that capital punishment was now only imposed for murder in that country ("With regard to mitigation of the sentence. it is the practice of the courts in cases where the motive for the murder was a matter relating to honour, to regard this motive as an extenuating circumstance . . . .", *id.* at 35-36). The response from Sierra Leone suggests a *de facto* abolition of the death penalty for rape: "The death sentence is still passed though this is mandatory only in treason and murder cases. The death penalty is retained more in theory as only very few people have been executed," *id.* at 67.

almost no one in the world is actually executed for rape outside of the United States and South Africa.[58]

Second, the trend toward actual disuse of the death penalty for rape in this country has been precipitous during the past thirty years, as the following figures show:

Year	*Number of Executions for Rape*[59]		
	White	*Black*	*Total*
1946	0	22	22
1947	2	21	23
1948	1	21	22
1949	0	10	10
1950	4	9	13
1951	2	15	17

(continued)

[58]Patrick provides figures for the average yearly number of executions (1958-1962) *for all crimes* for each country except the People's Republics of China and Mongolia, and Sierra Leone. None of the countries for which figures are given executed more than two men a year for all crimes, except Basutoland (3), Korea (68), Northern Rhodesia (6.5) [which has now abolished the death penalty for rape (*see* note 56 *supra*)] and the Republic of South Africa (100). It is known that fewer than 10 percent of South Africa's 100 executions yearly are for rape, Kahn, *The Death Penalty in South Africa,* 18 TYDSKRIF VIR HENDENDAAGSE ROMEINS-HOLLANDSE REG 108, 116-117 (1970). It has been reported that, between 1947 and 1969, 844 rape convictions of black South Africans resulted in 121 death sentences, while 288 rape convictions of white South Africans resulted in 3 death sentences. *The Manchester Guardian Weekly,* August 14, 1971, p. 4.

[59]UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, National Prisoner Statistics Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974* (November 1975) 16-17. This source covers the years through 1974. There were no executions in the United States during calendar year 1975.

Year	*Number of Executions for Rape*		
	White	*Black*	*Total*
1952	1	11	12
1953	1	6	7
1954	1	8	9
1955	1	6	7
1956	0	12	12
1957	2	8	10
1958	0	7	7
1959	1	7	8
1960	0	8	8
1961	1	7	8
1962	2	2	4
1963	0	2	2
1964	3	3	6
1965	0	0	0
1966	0	0	0
1967	0	0	0
1968	0	0	0
1969	0	0	0
1970	0	0	0
1971	0	0	0
1972	0	0	0
1973	0	0	0
1974	0	0	0
1975	0	0	0

Third, as these statistics indicate, the overwhelming majority of defendants executed for the crime of rape in this country during the past thirty years have been black. Indeed, since 1930, when reliable statistics began to be kept by the federal government, 48 whites, 405 blacks, and 2 members of other minorities have been put to death for this crime.[60] On July 2, 1976, of the

[60]*Ibid.*

twenty-eight persons under sentence of death for rape in the United States, twenty-one were black.[61]

There is historical evidence that, in Georgia, the death penalty. for rape was specifically devised as a punishment for the rape of white women by black men.[62] Over the years, one of the most frequent and

[61]Of the three persons on Death Row in Georgia for rape, *see* note 41 *supra*, two were black, Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae in *Gregg v. Georgia*, supra [No. 74-6257], Appendix A, at 1a-4a (filed Feb. 22, 1976); both of the persons on Death Row in Florida for sexual battery were white, Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae in *Proffitt v. Florida, supra* [No. 75-5706], Appendix A, at 1a-11a (filed Feb. 22, 1976); seven of the eight persons on Death Row in North Carolina for first degree rape were black, Brief for Petitioner in *Woodson v. North Carolina, supra* [No. 75-5491], Appendix A, at 42-46 (filed Feb. 22, 1976); twelve of the fourteen persons on Death Row in Louisiana for aggravated rape were black, Brief for Petitioner in *Roberts v. Louisiana, supra* [No. 75-5844], Appendix A, at 1a-4a (filed Feb. 22, 1976). The sole Mississippian condemned for rape was white, *see* note 40 *supra*.

[62]Appendix A, *infra*, reprinted from Brief for Petitioner in *Jackson v. Georgia*, 408 U.S. 238 (1972) [No. 69-5030], Appendix B, traces the history of the punishment for rape in Georgia since the days of slavery. Prior to the Civil War, rape committed by a white man was never regarded as sufficiently serious to warrant a penalty greater than 20 years imprisonment. Rape committed by a slave or a free person of color upon a white woman was punishable by death. One year after the abolition of slavery, however, a facially color-blind statute was enacted, giving juries discretion to sentence any man convicted of rape to either death or not more than twenty years imprisonment. (It was not until 1960 that the third option of life imprisonment was added to these two alternatives.) Despite the ostensible neutrality of the statute, the post-Civil War racial sentencing pattern varied little from the ante-bellum pattern. *See* page 56 *infra*.

insistent criticisms of ostensibly color-blind rape statutes was that they were administered discriminatorily so that blacks were disproportionately executed for rape.[63] Recent statistical studies have proved the

[63]*See e.g.*, Bye, *Recent History and Present Status of Capital Punishment in the United States*, 17 J. CRIM. L. 234, 243 (1926) ("[t]he fact that all but one of these states (Nevada) [that authorize the death penalty for rape] is located in the southeastern part of the United States would indicate that capital punishment is still used for this offense because it is occasionally committed by Negroes upon white women, a crime which arouses the most violent indignation on the part of the whites, and which they accordingly treat with severity"); Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 10 (1952) (capital punishment for rape "is a penalty directed primarily against Negroes in southern states"); *see also id.* at 14-16; BEDAU, THE DEATH PENALTY IN AMERICA 413 (rev. ed. 1967) ("of the nineteen jurisdictions that have executed men for rape since 1930, a third of them have executed only Negroes. In these six states, the very existence of rape as a crime with an optional death penalty is, in the light of the way it has been used, strong evidence of an original intent to discriminate against non-whites. This was probably the purpose behind the decision in Tennessee in 1915 to abolish capital punishment for murder and treason, but to retain it for rape"); Wolfgang & Riedel, *Rape, Racial Discrimination, and the Death Penalty*, in BEDAU & PIERCE, eds., CAPITAL PUNISHMENT IN THE UNITED STATES (1976), at 99, 118-119 (describing the results of a study in which rape convictions were factored to determine the impact of race and thirty-four non-racial variables on sentence:

> "Based upon a refined statistical analysis of rape convictions in states where rape has been a capital crime, the two analyses show that there has been a patterned, systematic and customary imposition of the death penalty. Far from being 'freakish' or capricious, sentences of death have been imposed on blacks, compared to whites, in a way that exceeds any statistical notion of chance or fortuity. Moreover, the systems of criminal justice in the jurisdictions studied have inflicted the death penalty on blacks in such disproportions without statutory or other legally acceptable bases. Thus, with the benefit of a carefully designed and objectively analyzed study of these conditions, it can be concluded that the significant racial differentials found in the imposition of the death penalty [for rape] are indeed produced by racial discrimination.")

fact of discrimination conclusively, both generally[64] and for Georgia in particular.[65] We make this point – although petitioner himself is white – because it plainly demonstrates the nature and extent of the acceptance which the death penalty for rape has historically enjoyed in Georgia and in this country. The roots of that acceptance have lain in racial, not penal, considerations. In light of the infinitesimal number of persons now condemned for rape, it is clear that capital punishment for this crime is not "still widely accepted," *Trop v. Dulles, supra,* 356 U.S. at 99 (plurality opinion), in any case. But where race does not enter the picture, its acceptance is postively aberrational. If executed, petitioner will be the fourth white man put to death for rape in the State of Georgia since the federal government began keeping execution statistics in 1930. During the same period of more than forty-five years, Georgia has electrocuted fifty-eight black men for rape.[66]

This freakishly rare and racially disproportionate imposition of the death penalty for the crime of rape in Georgia has insulated an excessive punishment from the scrutiny of enlightened public conscience. For both the public and a democratically elected legislature can easily tolerate the rare, random occurrence of a punishment which, if applied regularly, would be intolerable. That is

[64] *Ibid. See also* Wolfgang & Riedel, *Race, Judicial Discretion and the Death Penalty,* 407 ANNALS 119 (1973).

[65] Wolfgang & Riedel, *Rape, Race, and the Death Penalty in Georgia,* 45 AM. J. ORTHOPSYCHIATRY 658 (1975).

[66] UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, National Prisoner Statistics Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974* (November 1975) 21.

just the kind of penalty at which a constitutional prohibition of cruel and unusual punishments must aim. Whether it happen by accident or design that penalties of this kind fall most harshly upon the poor and upon racial minorities, the supposed "acceptances" of the penalty is nonetheless a product of the outcast nature of those who bear the brunt of it. The death penalty for rape is tolerated at all today only because it is so rarely inflicted.

That the death penalty for rape is rare and unusual permits local political acceptance of its cruelty, but, for that very reason, requires judicial condemnation under the Eighth Amendment.[67] Rare and uneven usage which

[67] Although the victim in this case was not physically harmed, apart from the rape itself, *see* pages 18, 22, *supra,* petitioner's Eighth Amendment contention in this case is not grounded upon the assumption that the "victim's life was neither taken nor endangered," *Ralph v. Warden,* 438 F.2d 786, 787 (CA4 1970). This is so both because contemporary standards of decency have repudiated death as a punishment for rape regardless of the threat to life presented by the crime (it should be noted, also, that no American jurisdiction makes attempted murder a capital offense, Comment, *Constitutional Law: Capital Punishment for Rape Constitutes Cruel and Unusual Punishment When No Life Is Taken or Endangered,* 56 MINN. L. REV. 95, 106 (1971)), and because the "endangering life" standard appears to be so broad as to be unworkable. "In any rape there is to a certain extent an *endangering of life,* as there is in any violent crime." Note, *Criminal Law–The Limited Application of the Eighth Amendment's Cruel and Unusual Punishment Clause to the Death Penalty,* 7 WAKE FOREST L. REV. 494, 495 (1975) (emphasis in original).

> "There is a sense in which life is always endangered by sexual attack, just as there is a sense in which it is always endangered by robbery, or by burglary of a dwelling or by any physical assault. The threat of violence is not the less a threat by being conditional, and violence always carries the possibility of a fatal encounter."

Packer, *Making the Punishment Fit the Crime,* 77 HARV. L. REV. 1071, 1077 (1964). *See also* Comment, *supra,* 56 MINN.

(continued)

evades the public conscience politically demands a supervision by the public conscience, speaking through the courts, which the Eighth Amendment promises. *Furman v. Georgia,* 408 U.S. 238 (1972); *Gregg v. Georgia, supra,* 49 L.Ed.2d at 883; 887 n.47 (plurality opinion). This is the more true because, we submit, such usage itself affronts "the dignity of man," *Trop v. Dulles, supra,* 356 U.S. at 100 (plurality opinion), and those cherished principles of fair and regular, nonarbitrary treatment of the citizen which the Eighth Amendment, no less than the Fourteenth, supposes. In the unanimous and overwhelming judgment of history, modern legislatures, and contemporary juries, the death penalty for rape is "no longer consistent with our self-respect."[68]

(footnote continued from preceding page)
L. REV. at 104-105; Comment, *Cruel and Unusual Punishment–The Constitutionality of the Death Penalty for Rape Where Victim's Life Neither Taken Nor Endangered,* 5 U. RICHMOND L. REV. 392, 399 n.43 (1971). *Compare Ralph v. Warden, supra,* to *Harris v. Stephens,* 361 F.2d 888, 894-895 (CA8 1966); *Mitchell v. Stephens,* 353 F.2d 129, 135 (CA8 1965); *Maxwell v. Stephens,* 348 F.2d 325, 332 (CA8 1965).

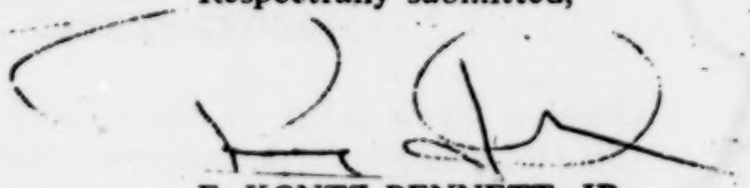
[68]Lord Chancellor Gardiner, in 268 HANSARD, PARLIAMENTARY DEBATES (5th series) (Lords, 43d Parl., 1st Sess., 1964-1965), 703 (1965):

> "When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self-respect."

CONCLUSION

Petitioner's death sentence for rape is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the Georgia Supreme Court should therefore be reversed.

Respectfully submitted,



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APPENDIX A

[This Appendix appeared as Appendix B to Brief for Petitioner, in *Jackson v. Georgia*, No. 69-5030 (408 U.S. 238 (1972)) at pp. 1b-6b.]

HISTORY OF PUNISHMENT FOR RAPE IN GEORGIA

The Georgia Penal Code of 1811, which expressly applied to free white persons only,[1a] provided that rape would be punished by imprisonment at hard labor for not less than seven nor more than sixteen years.[2a] An Act "To establish a Tribunal for the trial of Slaves within this State," enacted on the same date as the Penal Code December 16, 1811, in effect provided that slaves could be sentenced to death for *any crime* at the discretion of a tribunal for slaves.[3a] On November 23,

[1a] "*And be it further enacted,* That the operation of this law, and all parts thereof shall be construed to extend to free white persons only." Penal Code of 1811, §67, printed in LAMAR, COMPILATION OF THE LAWS OF GEORGIA (1821) [hereafter cited as LAMAR] 552.

[2a] "*Be it further enacted,* That if any man shall have or take carnal knowledge of any woman by force, or against her will or consent, every such person, his aiders or abettors, shall, upon conviction thereof, be sentenced and confined to hard labour, for and during a term not less than seven years, nor more than sixteen." Penal Code of 1811 §60, LAMAR 551.

[3a] "The Act provided that when a complaint was made to a justice of the peace of "any crime having been committed by any slave or slaves," he should summon two other justices to try the case. If it appeared to the justices that the crime should be punished by death, a trial before a jury of "twelve free white persons" was to be held. If the jury returned a verdict of guilty, "the court shall immediately pronounce sentence of death by hanging, or such other punishment not amounting to death . . . ." Ga. Acts of 1811, No. 503, at 979-800.

1815, the Act of 1811 which established a tribunal for the trial of slaves, was made applicable to all offenses committed by "free persons of colour."[4a] On December 18, 1816, the penalty for rape in the Penal Code applicable to whites was changed to imprisonment for not less than two nor more than twenty years, and a section was added punishing attempted rape by imprisonment for not less than one nor more than five years.[5a] The following day, December 19, 1816, an act was passed which expressly provided that the punishment of slaves and "free persons of colour" for the crime of rape or attempted rape of a free white female should be death.[6a]

[4a]"BE it enacted by the Senate and House of Representatives of the state of Georgia, in General Assembly met, and is hereby enacted by the authority of the same, That an act passed at Milledgeville, on the 16th day of December, 1811, entitled An act to establish a tribunal for the trial of slaves within this state; the court therein established is hereby made a tribunal for offences committed by free persons of colour, to all intents and purposes, as if the words free persons of colour had been inserted in the caption, and every section of the said act to establish a tribunal for the trial of slaves within this state." Ga. Acts of 1815, No. 504, LAMAR 800.

[5a]"Rape shall be punished by imprisonment at hard labour in the penitentiary, for a term not less than two years, nor longer than twenty years, as the jury may recommend.

"An attempt to commit rape shall be punished by imprisonment at hard labour in the penitentiary, for a term not less than one year, nor longer than five years, as the jury may recommend." Penal Code of 1816 §§33-34, at LAMAR 571.

[6a]"BE it enacted by the Senate and House of Representatives of the General Assembly of the state of Georgia, and it is hereby enacted by the authority of the same, That the following shall be considered as capital offences, when committed by a slave or free person of colour: . . . committing a rape, or attempting it, on a free white female: . . . every and each of these offences shall, on conviction, be punished with death." Ga. Acts of 1816, No. 508, §1, at LAMAR 804.

A Code of the State of Georgia published in 1861 shows that sometime between the years 1816 and 1861, the rape provisions were again amended. Rape by a white person upon a free white female remained punishable by imprisonment for no less than two nor more than twenty years; rape by a white person upon a slave or free person of color was made punishable "by fine and imprisonment at the discretion of the court;" an assault with intent to commit rape remained punishable by one to five years imprisonment.[7a] Rape upon a free white female by a slave or free person of color remained punishable by death.[8a] However, attempted rape upon a free white female was made punishable by death "or such other punishment as the court may prescribe, proportionate to the offence and calculated to prevent the occurrence of like offences in the future."[9a]

[7a]"Rape is the carnal knowledge of a female, whether free or slave, forcibly and against her will.

"Rape on a free white female shall be punished by an imprisonment at labor in the penitentiary for a term not less than two years nor longer than twenty years. If committed upon a slave, or free person of color, by fine and imprisonment, at the discretion of the court.

"An assault with intent to commit a rape, shall be punished by an imprisonment at labor in the penitentiary for a term not less than one year nor longer than five years." Penal Code §§4248-4250, printed in CLARK, COBB & IRWIN, CODE OF THE STATE OF GEORGIA (1861) 824.

[8a]"The following offences, when committed by a slave or free person of color, shall be punished, on conviction, with death, viz: . . . rape upon a free white female." Penal Code for Slaves and Free Persons of Color, §4704, printed in *id.* at 918.

[9a]"The following offences, when committed by a slave or free person of color, shall be punished in the discretion of the court, either by death or such other punishment as the court may prescribe, proportionate to the offence and calculated to prevent the occurrence of like offences in future, viz: Attempt to commit a rape upon a free white female . . ." Penal Code for Slaves and Free Persons of Color, §4708, in *id.* at 918.

The Georgia Constitution of 1865, enacted November 8, 1865, abolished slavery. On March 20, 1866, the rape provision of the Penal Code applicable to whites[10a] was amended. The crime of rape was reduced below a felony and made punishable by "a fine not to exceed one thousand dollars, imprisonment not to exceed six months, whipping not to exceed thirty-nine lashes, to work on a chain gang on the public works not to exceed twelve months, and any one or more of these punishments . . . in the discretion of the Judge."[11a] This amended provision was repealed on December 11, 1866, and the prior provisions of the code relating to punishment were reinstated.[12a]

[10a] §4248. *See* note 7a *supra*.

[11a] "The General Assembly of the State of Georgia do enact, That from and after the passage of this Act the crimes defined in the following Sections of the Penal Code as felonies, and punishable by imprisonment in the Penitentiary, shall henceforth be reduced below felonies, and punished in the manner hereinafter set forth, viz: Sections . . . 4248 . . . . .

"5. SEC. II. That all other crimes designated in the Penal Code punishable by fine and imprisonment, or either, shall be likewise punishable in the manner hereinafter set forth, that is to say, the punishment for any of the aforesaid crimes, hereafter committed, shall be a fine not to exceed one thousand dollars, imprisonment not to exceed six months, whipping not to exceed thirty-nine lashes, to work in a chain gang on the public works not to exceed twelve months, and any one or more of these punishments may be ordered in the discretion of the Judge." Ga. Acts 1866, No. 236, p. 233.

[12a] "SECTION I. *Be it enacted, etc.* That from and after the pasage of this act, so much of the first section of an act entitled an act to alter and amend the Penal Code of Georgia, passed March 12th, 1866, as relates to section 4248 of the Code of Georgia, be and the same is hereby repealed, and that said section 4248 be of force as before the passage of said act.

"SEC. II. Repeals conflicting laws." Ga. Acts 1866, No. 209, p. 151.

On December 15, 1866, a new rape statute was enacted which made rape punishable by death or by imprisonment for no less than one nor more than twenty years at the discretion of the jury, and which made assault with intent to commit rape punishable by imprisonment for no less than one nor more than twenty years.[13a]

The legislative history of the Act passed on December 15, 1866, is not especially instructive. The bill as it was first read in the Georgia House of Representatives provided that all rape shall be punished with death.[14a] Prior to the third reading in the House,

[13a] "SECTION I. *Be it enacted, etc.*, That from and immediately after the passage of this act, the crime of rape, in this State, shall be punished with death, unless the defendant is recommended to mercy by the jury, in which case the punishment shall be the same as for an assault with intent to commit a rape. An assault with intent to commit rape, in this State, shall be punished by an imprisonment at hard labor in the Penitentiary of this State, for a term not less than one nor longer than twenty years.

"SEC. II. Repeals conflicting laws." Ga. Acts 1866, No. 210, p. 151.

As codified in the Code of 1933, the penalty provision reads: "The crime of rape shall be punished with death, unless the defendant is recommended to mercy by the jury, in which case the punishment shall be for not less than one nor more than 20 years." Ga. Code Ann. §26-1302 (1953).

[14a] "Sec. 1st. The General Assembly of Georgia do enact, That from and immediately after the passage of this act, the crime of Rape in this State shall be punished with death. An assault with intent to commit a Rape in this State shall be punished by an imprisonment at hard labor in the Penitentiary of this State for a term not less than one nor longer than twenty years.

"Sec. 2d. And be it further enacted that all laws and parts of laws militating against this Act be and the same are thereby repealed." Humphries of Lincoln, A Bill to be entitled An Act to alter and change the 4249th and 4250th paragraphs of the Code of Georgia, in custody of Georgia State Archives, Atlanta, Georgia.

the provision for the alternative punishment of imprisonment was written into the bill, and the bill was passed the House with this amendment on November 26, 1866.[15a] The bill then passed the Senate without further amendment. The Journals of both the Georgia House of Representatives and the Georgia Senate reveal that the Georgia legislature was not engaged in a comprehensive reform of the Georgia penal law, but passed this bill concerning rape at a time when it was considering a variety of unrelated subjects.[16a]

In 1960, the penalty for rape was amended to add the alternative of life imprisonment to the already existing choices.[17a] In the comprehensive revision of the penal code in 1968, the language was revised, but not its effect.[18a]

[15a] "... [U]nless the defendant is recommended to mercy by the jury in which case the punishment shall be the same as for an assault with intent to commit a rape." *Ibid.*

[16a] *See Journal of the Senate of the State of Georgia* (1866); *Journal of the House of Representatives of the State of Georgia,* commenced November 1, 1866 (1866).

[17a] "The crime of rape shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment for life: Provided, however, the jury in all cases may fix the punishment by imprisonment and labor in the penitentiary for not less than one year nor more than 20 years." Ga. Acts 1960, No. 587, p. 266; Ga. Code Ann. §26-1302 (Supp. 1970).

[18a] "A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years." Ga. Acts 1968, pp. 1249, 1299; Ga. Code Ann. §26-2001 (1970 Revision) (effective July 1, 1969).

APPENDIX B

RAPE CASES ADJUDICATED UNDER THE 1973 GEORGIA CAPITAL PUNISHMENT STATUTE

Since its decision in *Coley v. State*, 231 Ga. 829, 204 S.E.2d (1974), the Georgia Supreme Court has reviewed a number of rape convictions, but apart from *Coley*, it has only considered death sentences in the present case *Coker v. State*, 234 Ga. 555, 216 S.E.2d 782 (1975)); *Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12 (1974), *pending here on petition for certiorari as Eberheart v. Georgia*, No. 74-5174; and *Hooks v. State*, 233 Ga. 149, 210 S.E.2d 668 (1974), *pending here on petition for certiorari as Hooks v. Georgia*, No. 74-5954.[1b]

A review of the volumes of appellate reports of the Georgia Supreme Court and Courts of Appeals following the report of the *Coley* decision reveals that fifty-eight rape cases have been adjudicated on appeal. In ten cases, the Court's opinion indicates that the date of the crime was prior to the March 28, 1973, effective date of the 1973 Georgia capital punishment statute.[2b] However, in six cases where the date of the crime is not

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[1b] In *Gibson v. State*, ___ Ga. ___, 226 S.E.2d 63 (1976), No. 76-5231, *certiorari denied*, November 29, 1976, the death penalty was imposed both for the rape and murder of the victim; the Supreme Court of Georgia vacated the death penalty for rape because that felony formed the predicate of the felony-murder conviction.

[2b] *Burnett v. State*, 236 Ga. 597, 225 S.E.2d 28 (1976); *Parmer v. State*, 236 Ga. 507, 224 S.E.2d 375 (1976); *Burnett v. State*, 234 Ga. 741, 218 S.E.2d 4 (1975); *Furgerson v. State*, 234 Ga. 594, 216 S.E.2d 845 (1975); *Clemmons v. State*, 233 Ga. 187, 210 S.E.2d 657 (1974); *Payne v. State*, 233 Ga. 294, 210 S.E.2d 775 (1974); *Jones v. State*, 232 Ga. 762, 208 S.E.2d 850 (1974); *Estes v. State*, 232 Ga. 703, 208 S.E.2d 806 (1974); *Hicks v. State*, 232 Ga. 393, 207 S.E.2d 30 (1974); *Godbee v. State*, 232 Ga. 259, 206 S.E.2d 432 (1974).

revealed in the appellate opinion, the indictment reveals that the crime occurred before March 28, 1973.[3b]

In seventeen cases, it is clear from the Court's opinion that the crime of rape occurred after March 28, 1973, but that the jury or trial court imposed a sentence of life imprisonment.[4b] Additionally, in twenty-one cases where the date of the crime is not revealed in the appellate opinion, the indictment reveals that the crime occurred after March 28, 1973.[5b]

[3b]*Jones v. State*, 235 Ga. 155, 218 S.E.2d 899 (1975); *Bloodworth v. State*, 233 Ga. 589, 212 S.E.2d 774 (1975); *Nealey v. State*, 233 Ga. 326, 211 S.E.2d 286 (1974); *Jones v. State*, 232 Ga. 324, 206 S.E.2d 481 (1974); *Robinson v. State*, 232 Ga. 123, 205 S.E.2d 210 (1974); *Howard v. State*, 231 Ga. 877, 204 S.E.2d 629 (1974).

[4b]*Welch, Swain & Harris v. State*, Ga. Sup. Ct. No. 31374 (Sept. 28, 1976); *Atkins v. State*, 236 Ga. 624, 225 S.E.2d 7 (1976); *McNeese v. State*, 236 Ga. 26, 222 S.E.2d 318 (1976); *Evans v. State*, 235 Ga. 396, 219 S.E.2d 725 (1975); *Woodard v. State*, 234 Ga. 901, 218 S.E.2d 629 (1975); *Jessen v. State*, 234 Ga. 791, 218 S.E.2d 52 (1975); *Nations v. State*, 234 Ga. 709, 217 S.E.2d 287 (1975); *Zilinmon v. State*, 234 Ga. 535, 216 S.E.2d 830 (1975); *Lynch v. State*, 234 Ga. 446, 216 S.E.2d 307 (1975); *Long v. State*, 233 Ga. 926, 213 S.E.2d 853 (1975); *Crowder v. State*, 233 Ga. 789, 213 S.E.2d 620 (1975); *Hammock v. State*, 233 Ga. 733, 213 S.E.2d 618 (1975); *Milton Jones & Moore v. State*, 233 Ga. 662, 212 S.E.2d 832 (1975) (opinion indicates that a third co-defendant, David Jones, was also convicted, but did not appeal with his two co-defendants, 212 S.E.2d at 832); *Wanzer v. State*, 232 Ga. 523, 207 S.E.2d 466 (1974).

[5b]*Harris v. State*, 236 Ga. 719, 225 S.E.2d 237 (1976) (Dougherty County Superior Court Indictment No. 40139; crime–Oct. 19, 1975); *Parmer v. State*, 236 Ga. 507, 224 S.E.2d 375 (1976) (Clayton County Superior Court Indictment No. 8-13592; crime–Dec. 12, 1974); *Curtis v. State*, 236 Ga. 362, 223 S.E.2d 721 (1976) (Chatham County Superior Court Indictment Nos. 23015 & 23016; crime–Aug. 6, 1974); *Smith & Bickers v. State*, 235 Ga. 852, 221 S.E.2d 601 (1976) (Clayton County Superior Court Indictment No. 9-19718; crime–July 27,

(continued)

Thus, in the forty-two rape cases reviewed by the Georgia Supreme Court arising under the 1973 capital punishment statute, the death penalty has been imposed in four cases (and in one of these, it was vacated as disproportionate by the Supreme Court of Georgia, see *Coley v. State, supra*), and a sentence of imprisonment

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(footnote continued from preceding page)

1973); *Watson v. State*, 235 Ga. 461, 219 S.E.2d 763 (1975) (Cobb County Superior Court Indictment No. 5829; crime–Dec. 8, 1973); *McFall v. State*, 235 Ga. 105, 218 S.E.2d 839 (1975) (Clayton County Superior Court Indictment Nos. 8-13040 & 8-13072; crime–April 28, 1974); *Wood v. State*, 234 Ga. 758, 218 S.E.2d 47 (1975) (Clarke County Superior Court Indictment No. 12613; crime–Mar. 13, 1974); *Thomas v. State*, 234 Ga. 635, 217 S.E.2d 152 (1975) (Clarke County Superior Court Indictment No. 12698; crime–June 4, 1974); *Smith v. State*, 234 Ga. 320, 215 S.E.2d 687 (1975) (Clayton County Superior Court Indictment No. 8-12621; crime–Nov. 23, 1973); *Williams v. State*, 234 Ga. 258, 215 S.E.2d 260 (1975) (Montgomery County Superior Court Indictment No. 6-229; crime–June 5, 1973); *Ellard & Whittier v. State*, 233 Ga. 640, 212 S.E.2d 816 (1975) (Fulton County Superior Court Indictment No. A-19315; crime–Nov. 12, 1973); *Curry v. State*, 233 Ga. 455, 211 S.E.2d 746 (1975) (DeKalb County Superior Court Indictment No. _____; crime–June 1, 1973); *Wimberly v. State*, 233 Ga. 386, 211 S.E.2d 281 (1974) (Fulton County Superior Court Indictment Nos. A-20121, A-20122, & A-20123); *Muckle v. State*, 233 Ga. 337, 211 S.E.2d 361 (1974) (Clarke County Superior Court Indictment No. 12610; crime–Mar. 29, 1974); *Price v. State*, 233 Ga. 332, 211 S.E.2d 290 (1974) (Gwinnett County Superior Court Indictment No. 9529; crime–Nov. 24, 1973); *Hunt v. State*, 233 Ga. 329, 211 S.E.2d 288 (1974) (Chatham County Superior Court Indictment No. 22-334; crime–Nov. 15, 1973); *Allen v. State*, 233 Ga. 200, 210 S.E.2d 680 (1974) (Fulton County Superior Court Indictment Nos. A-19028 & A-19029; crime–July 25, 1973); *Mack v. State*, 233 Ga. 200, 210 S.E.2d 680 (1974) (Fulton County Superior Court Indictment Nos. A-19028 & A-19029; crime–July 25, 1973); *Rowe v. State*, 232 Ga. 700, 208 S.E.2d 500 (1974) (Fulton County Superior Court Indictment No. A-17193; crime–May 1, 1973).

has been imposed in thirty-eight cases. This estimate tends to understate the proportion of rape cases in which a sentence of imprisonment rather than death is imposed, however, since while there is mandatory appeal of all death cases, *see* Ga. Code Ann. §27-2537(a) (1975 supp.), there is no guarantee that any appeal will be taken in cases where the sentence is non-capital.[6b]

[6b]In *Jones v. State*, 233 Ga. 662, 212 S.E.2d 832 (1975), for example, the Supreme Court of Georgia indicates that one of the three co-defendants convicted of rape and sentenced to imprisonment has not taken an appeal.